UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LINDA KLEIN,

Plaintiff,

-against-

VERIZON SERVICES CORP.,

Defendant.

07 Civ. 2815 (GBD)(HBP)

ORDER

PITMAN, United States Magistrate Judge:

By letter dated April 14, 2010, plaintiff sought to compel defendant to respond to document requests served in March and April 2010. On June 11, 2010, I granted plaintiff's application to the extent the requests sought certain e-mails and other electronic documents identified in depositions (Docket Item 31). By letter dated July 1, 2010, counsel for plaintiff represented that Verizon had failed to produce the documents that were the subject of my Order.

On July 23, 2010, I held a conference at which defendant's counsel represented that all existing documents that were responsive to plaintiff's document requests had been produced. Despite this representation, plaintiff's counsel reiterated her belief that defendant's production was incomplete. Confronted with these contradictory representations, I directed plaintiff's

counsel to submit the deposition testimony or other evidence that she believed demonstrated the existence of the purportedly missing documents. Counsel for plaintiff was also directed to submit a statement that she had diligently reviewed defendant's document production and that the documents she claimed were missing had not, in fact, been produced.

Plaintiff made her submission on July 28, 2010. Defendant submitted a response dated August 18, 2010, reiterating that it had "produced all e-mails and other electronic communications responsive to plaintiff's discovery requests"[1] and claiming that plaintiff had "mischaracterized" the nature of the deposition testimony that plaintiff claimed established the existence of the missing documents. Plaintiff submitted a reply on August 24, 2010.

Based on the parties' submissions and as explained in more detail below, I conclude with respect to the majority of the e-mails in issue, plaintiff has not established that the "missing" e-mails actually exist.[2]

---

[1]Defendant does not argue that the documents plaintiff identifies in her July 28, 2010 submission are outside the scope of the document requests she served in March and April of 2010 and so I presume them to be responsive.

[2]In her reply letter, plaintiff suggests that she is not required to prove the existence of the documents she is seeking. This argument overlooks the specific background of this dispute.

(continued...)

1. Documents Not Proven to Exist

a. Instant message from John Christiansen to plaintiff stating that plaintiff "had enough points to retire."

Although Larry Stevens testified that plaintiff told him that she had received this instant message (Deposition of Larry Stevens ("Stevens Dep."), at 144-45), he did not testify that he saw the e-mail and could not definitively recall that plaintiff told him about the instant message; Stevens testified that he thought plaintiff had received the message (Stevens Dep. at 144). In addition, Christiansen testified that he did

[2](...continued)
Defendant has produced a number of documents in this case. Nevertheless, plaintiff claims that a relatively small handful of documents are missing from defendant's production. In response to plaintiff's contention, defendant has already double-checked and stated on the record that all existing, responsive documents have been produced. Given the adverse consequences that defendant and its counsel would suffer if this representation were untrue, I do not assume that defendant and its counsel are being dishonest. Given the parties' conflicting representations concerning the existence of the documents discussed in the text, I could either direct plaintiff to offer evidence suggesting the existence of the documents she claims are missing or compel defendant to prove that the documents do not exist. Given the inherent difficulty of proving a negative proposition, I conclude that it is more appropriate to require plaintiff to explain her belief that the documents exist and have not been produced.

not recall sending such an instant message (Deposition of John Christiansen ("Christiansen Dep."), at 152).

b. E-mail between Christiansen and Stevens regarding the consolidation of plaintiff's job. Christiansen testified that he communicated with Stevens about job consolidation at Verizon, but that he did not recall if these communications were in writing (Christiansen Dep. at 129-30). Plaintiff argues that Christiansen must have e-mailed Stevens about the job consolidation because he testified to sending Stevens e-mails about events in his group (Christiansen Dep. at 104), and the consolidation occurred within the group. However, in light of Christiansen's specific testimony that he did not recall whether the communication with Stevens was in written or oral form, plaintiff's argument is not persuasive.

c. E-mail between Stevens and Christiansen after Christiansen left Verizon. Stevens testified that he thinks he may have sent one e-mail to Christiansen after he left Verizon (Stevens Dep. at 46). This testimony is too tentative to establish the existence of the document and to rebut defense counsel's repre-

sentation that Verizon's search for responsive documents did not disclose this document.

d. E-mail from Joseph Romanoski to Human Resources proposing two management levels. Romanoski testified, "I am leaning towards yes, I believe I did, [] send it to HR to propose two similar management levels . . . I believe I did put [] an e-mail together of that" (Deposition of Joseph Romanoski ("Romanoski Dep."), at 172). Unfortunately, plaintiff's counsel has not included the page of Romanoski's deposition containing the question to which the foregoing testimony responded. In any event, the testimony is, again, far too tentative ("I am leaning towards . . .") to rebut defense counsel's representation that Verizon's search for responsive documents did not disclose this document.

e. E-mail between Vicki Leonard and Romanoski transmitting an unidentified recommendation. Romanoski testified that he did not remember if the recommendation was in writing, adding only that if the recommendation was in writing it would "[m]aybe [be in] a string of e-mails, most likely" (Romanoski Dep. at 107). Again, the testimony is far too tentative to rebut defense coun-

sel's representation that Verizon's search for responsive documents did not disclose this document.

f. Romanoski's evaluation of plaintiff. Romanoski testified that his employee evaluations would be either e-mailed or faxed to the employee who was the subject of the evaluation (Romanoski Dep. at 129-30). This testimony is too tentative to establish that an e-mail transmitting the recommendation exists.

g. E-mail from Christiansen to Susan Williams-Sias containing selection criteria. Although Williams-Sias initially states that Christiansen e-mailed selection criteria to her, she later stated that she didn't know if the reduction-in-force documents (which presumably included the selection criteria documents) were e-mailed to her (Deposition of Susan Williams-Sias ("Williams-Sias Dep."), at 128). Again, the testimony is too tentative to rebut defense counsel's representation that Verizon's search for responsive documents did not disclose this document.

h. E-mails relating to a mentoring program at Verizon. Williams-Sias testified that she thought communications concerning the mentoring program were sent by e-mail and that "there were probably e-mail communications

announcing the program," but that she "wasn't involved in the facilitation of the program" (Williams-Sias Dep. at 225-26). She also testified that information about the mentoring program may have been provided by a link to a web site (Williams-Sias Dep. at 226). This testimony is too tentative to rebut defense counsel's representation that Verizon's search for responsive documents did not disclose this document.

i. E-mail from Linda Klein to Stevens about "red-lining."

Plaintiff apparently has her own copy of this document. It was marked at Stevens' deposition, and Stevens testified that he saw the document before and that he responded to it (Stevens Dep. at 206-07). In his August 18, 2010 response to plaintiff's application, Verizon's counsel states that Verizon searched Stevens' e-mail account and that all responsive documents have been produced. Although this document does exist, in view of the facts that plaintiff already has a copy of the e-mail, Verizon's witnesses do not contest the copy's authenticity and Verizon has already searched for the document, no purpose would be served by directing a further search by Verizon. Plaintiff is free to

make whatever arguments she deems appropriate as a result of Verizon's failure to produce this document.

j. E-mail sent by Kitty Linder on behalf of Gerard McCarthy. McCarthy's testimony was equivocal about the existence of this e-mail. Although he confirmed that Linder communicated with Diane Collins on his behalf, he did not know whether the communication took the form of a telephone call or an e-mail (Deposition of Gerry McCarthy at 253, 258). This testimony is too tentative to rebut defense counsel's representation that Verizon's search for responsive documents did not disclose this document.

k. E-mails between Stevens and Christiansen about plaintiff. Stevens testified that he and Christiansen e-mailed each other about employees in their division (Stevens Dep. at 30-31). Plaintiff does not cite any testimony from Stevens identifying specific e-mails to Christiansen about plaintiff that were not produced. This testimony is far too tentative to rebut defense counsel's representation that Verizon's search for responsive documents did not disclose this document.

l. Bi-weekly e-mail updates from Christiansen to Stevens. Christiansen testified that he e-mailed Stevens every

other Friday regarding events in his group (Christiansen Dep. at 104). However, to the extent the weekly communications related to the issues relevant to plaintiff's claims, Christiansen was not sure whether the communications took the form of e-mails or telephone calls (Christiansen Dep. at 129-30). This testimony is too tentative to rebut defense counsel's representation that Verizon's search for responsive documents did not disclose this document.

m. E-mails from Romanoski or Christiansen to Williams-Sias containing "RIF case documents." Williams-Sias was uncertain about whether Christiansen had e-mailed these documents to her and she did not definitively state that Romanoski e-mailed these documents to her. Rather, all that she stated was that "Joe would have sent me an e-mail just saying, [h]ere are the documents" (Williams-Sias Dep. at 127). This testimony is far too tentative to rebut defense counsel's representation that Verizon's search for responsive documents did not disclose this document.

2. E-mails Produced by Plaintiff

Plaintiff also submits copies of five e-mails between herself and others at Verizon that were not produced by defendant. To the extent she is seeking to compel production of these documents, the application is conditionally granted; within twenty (20) days of the date of this Order defendant is directed to produce its copies of these documents or to explain why it has not been able to locate and produce them. Plaintiff's counsel marked all of these documents at depositions and, although the witnesses did not recognize three of these documents and plaintiff does not submit the testimony discussing one of the documents, defendants do not dispute that these documents were internal Verizon e-mails or that they were responsive to plaintiff's document requests. Therefore, I find them to be within the scope of my June 11, 2010 Order directing defendants to

produce e-mails and other electronic documents identified in depositions.[3]

Dated: New York, New York
June 6, 2011

SO ORDERED

HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:

Gail I. Auster, Esq.
Law Offices of Gail I.
Auster & Associates, PC
Suite 711
17 Battery Place
New York, New York 10004

Scott H. Casher, Esq.
White & Williams, LLP
Suite 250
427 Bedford Road
Pleasantville, New York 10570

[3]Plaintiff states that she produced nine e-mails to Verizon at Christiansen's deposition that were sent via Verizon's internal e-mail system and that these e-mails should have been produced to her by Verizon. Only two of these e-mails are attached to plaintiff's submission, however, and the cited deposition testimony does not provide any information about the remaining seven e-mails. Therefore, to the extent plaintiff is seeking to compel the production of the remaining seven e-mails and to the extent these e-mails are not included within the documents discussed above, the application is denied because I cannot determine whether these e-mails are within the scope of my June 11, 2010 Order.